DOCKET FILE COPY ORIGINAL

ORIGINAL

PIPER & MARBURY
L.L.P.
1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430
202-861-3900
FAX: 202-223-2085

BALTIMORE
NEW YORK
PHILADELPHIA
EASTON

WRITER'S DIRECT NUMBER
(202) 861-3846
acolleli@pipermar.com

May 26, 1999

RECEIVED

MAY 26 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HAND DELIVERY

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Docket No. 96-98

Dear Ms. Roman Salas:

Pursuant to section 1.419(b) of the Commission's rules, transmitted herewith, on behalf of Prism Communication Services, Inc., are an original and twelve (12) copies of its comments in the above-referenced proceeding.

In addition, enclosed is a confirmation copy of this filing marked "Stamp In." Please date stamp this copy and return it to the courier delivering this package.

Should any questions arise concerning this filing, please contact the undersigned attorney directly.

Sincerely,

Julie A. Kaminski

Julie A. Kaminski

Enclosures

No. of Copies rec'd 0+12
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996	)	**CC Docket No. 96-98**
	)	
	)	

COMMENTS OF PRISM COMMUNICATION SERVICES, INC.

Randall B. Lowe
Julie A. Kaminski
Renée Roland Crittendon
J. Todd Metcalf
PIPER & MARBURY, L.L.P.
1200 Nineteenth Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 861-3900

Dated: May 26, 1999

SUMMARY OF THE ARGUMENT

Prism Communication Services, Inc. ("Prism"), formerly Transwire Communications, Inc., is an advanced telecommunications services company whose mission it is to build, operate and maintain a state-of-the-art, high-speed, digital, meshed telephone and data communications network, featuring Northern Telecom's Consumer Digital Modem ("CDM") technology. In Prism's opinion, the goals of the 1996 Act can best be achieved by developing a truly competitive market place and a regulatory environment that is conducive to technological innovation, capitalization and market investment in competitive telecommunications capability and services.

In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court upheld all but one of the local competition rules that had been challenged. Critically, the Court restored the Commission's broad jurisdiction to adopt rules interpreting and implementing the local competition provisions of the Telecommunications Act of 1996. In addition, the Court affirmed the reasonableness of almost all of the Commission unbundling rules. At the same time, however, the Court vacated section 51.319 of the Commission's rules, which identified the minimum set of network elements incumbents must make available to new entrants, and remanded that component of the Commission's *Local Competition Order* for further proceedings consistent with the Court's opinion. This *Second Further Notice of Proposed Rulemaking* arises directly from the Court's remand.

In its comments, Prism calls upon the Commission to distinguish between those components of its prior decision regarding the unbundling obligations which the Court calls into question and those which remain undisturbed. Second, Prism asserts that the Commission

should remain true to its initial categorical approach and adopt a uniform national list of network elements subject to its unbundling requirements. On this point, Prism also asks the Commission not to be persuaded by ILEC arguments asserting the necessity of more regionalized or individualized sets of network elements; those arguments are plainly contrary to both law and policy.

With respect to terminology, Prism asserts that the Commission should define the term *proprietary* in a comparatively narrow manner for purposes of section 251(d)(2)(A) to ensure the availability of network elements essential to the development of local competition. In addition, Prism contends that the Commission should find that unbundled access to a particular network element is *necessary* where a material loss in the functionality of the network element would result without access to its *proprietary* aspect(s) and the requesting carrier's service would be materially impaired without access. Prism also concludes that the Commission should find that a carrier is *impaired* for purposes of section 251(d)(2) if a lack of unbundled access to a particular network element materially adversely affects the carrier's ability to provide the proposed service. Finally, Prism urges the Commission to employ a variety of factors to guide the determination whether a particular network element satisfies either the *necessary* or *impair* standards. While, in theory, virtually all network elements are fungible, some alternative sources undoubtedly will not be practical or economically efficient. In those situations, the mere existence of a substitute should not be allowed to offset the statutory obligations of the ILECs.

Prism also urges the Commission to reaffirm its commitment to ensuring the availability on an unbundled basis of the seven network elements identified in the *Local Competition Order* but asks the Commission to clarify or refine the definitions of certain of those network elements, namely the local loop, interoffice transmission facilities, and operations support systems. Next,

Prism calls upon the Commission to provide for a uniform, open and expedited process by which a requesting carrier can propose that network elements not otherwise subject to the unbundling rules be offered to it on an unbundled basis. Finally, in order to provide certainty and predictability to a rapidly changing market, Prism asks the Commission to clarify that rights to a provisioned UNE vest in the requesting carrier once provided to that carrier by the incumbent. In other words, once a requesting carrier has obtained an unbundled network element from an incumbent, the incumbent should be prohibited from substituting a different network element absent a compelling showing of need.

Prism applauds the efforts of the Commission to promote competition in local markets and to eliminate existing barriers to the deployment of competitive telecommunications capability and services. However, without the full implementation of the foregoing safeguards, Prism and other potential competitive providers of telecommunications capability and services, will be handicapped by the monopoly access network practices of incumbent LECs, and will be ultimately ineffectual in their efforts to offer ubiquitous, lower-cost advanced capability and services in the immediate future.

Table of Contents

COMMENTS OF PRISM COMMUNICATION SERVICES, INC.

Prism Communication Services, Inc. ("Prism"), formerly Transwire Communications, Inc., by and through counsel, hereby submits its comments on the Federal Communications Commission's ("FCC" or "Commission") Second Further Notice of Proposed Rulemaking in the above-referenced proceeding concerning unbundled access to network elements.

I. INTRODUCTION AND BACKGROUND

In *AT&T Corp. v. Iowa Utilities Board*,[1] the Supreme Court upheld all but one of the local competition rules that had been challenged. Critically, the Court restored the Commission's broad jurisdiction to adopt rules interpreting and implementing the local competition provisions of the Communications Act of 1934, as amended.[2] In addition, the Court affirmed the reasonableness of almost all of the Commission's unbundling rules.

At the same time, however, the Court vacated Rule 51.319 ("Rule 319")[3] and remanded that component of the *Local Competition Order*[4] for further proceedings consistent with the

---

1 119 S. Ct. 721 (1999).

2 47 U.S.C. § 151 *et seq.* (1998).

3 47 C.F.R. § 51.319 (1998).

4 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Local Competition Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

Court's decision.[5] Rule 319 identified the network elements that an incumbent local exchange carrier ("ILEC") must make available to new entrants, based in part on the Commission's prior application of section 251(d)(2).[6] The Commission must now develop and apply a new section 251(d)(2) test that is consistent with the Court's decision and promulgate a new rule identifying the network elements that must be made available under section 251(c)(3).[7]

The Supreme Court held that the Commission's prior interpretation of the section 251(d)(2) factors was extreme—not in the results it ultimately reached but in the standard it applied.[8] The Supreme Court found that the Commission's standard virtually guaranteed that any requested element would satisfy section 251(d)(2).[9] The Court's holding, therefore, is exceptionally narrow and requires only that the Commission adopt a standard that contains a limiting principle that is more closely grounded in the statute and its overarching purposes. In responding to the remand, therefore, the Commission should exercise care to distinguish between that portion of its prior analysis that the Court found inadequate and the many other components of its analysis that the Court did not question and that remain valid and fully applicable. ILECs—as they have almost constantly since the Commission issued the *Local Competition*

---

5 119 S. Ct. at 736 (calling on the Commission to "determine on a rational basis which network elements must be made available taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements").

6 47 U.S.C. § 251(d)(2) (1998).

7 47 U.S.C. § 251(c)(3) (1998).

8 119 S. Ct. at 734-36.

9 *Id.* at 735.

Order—will no doubt seize upon this rulemaking as an opportunity to undo or scale back portions of the Commission's implementation of the local competition provisions of the 1996 Act that they were either unsuccessful in challenging or that they never challenged at all.

The vast majority of the Commission's implementation of the local competition provisions of the 1996 Act was not called into question by the Court. In particular, there are five components of the Commission's analysis and order that stand unchallenged by the Court's decision.

A. Components of the Commission's Prior Decision that Remain Untouched

First and most importantly, the Commission's *Local Competition Order* adopted a categorical approach to identifying network elements. The Commission required that the elements listed in Rule 319 be made available on the same basis in all geographic areas, to all new entrants, and for all types of customers.[10] The ILECs argued before the Supreme Court that more individualized decisions should be made under section 251(d)(2).[11] Nevertheless, the Court did not adopt that argument or in any wise question the categorical approach taken by the Commission. Quite to the contrary, the Court expressed its expectation that any network elements identified by the Commission on remand would be made available "unconditionally"[12]

---

10 *Local Competition Order*, ¶ 242 (explaining that "[n]ational requirements for unbundled elements" are necessary).

11 Indeed, at oral argument, the ILECs specifically but unsuccessfully argued for a market-by-market, carrier-by-carrier approach. Tr. at 67.

12 119 S. Ct. at 736.

and specifically noted that the categorical analysis employed by the Commission satisfied the "higher standard" the Court required.[13]

Moreover, the categorical approach adopted by the Commission is clearly correct both as a matter of law and of policy. Section 251(d)(2) confers upon the Commission the responsibility for "determining what network elements should be made available for purposes of subsection (c)(3)." If Congress had intended the core list of minimum network elements to be more localized, as it did in other instances in the 1996 Act,[14] it would have conferred decision-making authority on the State commissions allowing for guidance by more general FCC rules. The congressional decision not to apply such a paradigm to sections 251(c)(3) and 251(d)(2) militates strongly toward the conclusion that the minimum list of unbundled network elements ("UNEs") should be uniform and national in nature.

A categorical approach to the definition of network elements is critical to ensuring the statutory goal of "rapid" development in local competition. Other approaches would enable incumbents to engage in dilatory, piecemeal litigation on a market by market basis by claiming that access to a particular network element is not justified in light of local market conditions in what would become an unending and market-stopping process.[15] Thus, the Commission was on solid ground—legally and economically—when it concluded that categorical rules are essential

---

13 *Id.* at 734.

14 *See, e.g.*, 47 U.S.C. § 251(c)(4)(B) (resale restrictions) and 47 U.S.C. § 251(f) (rural exemptions).

15 Upon losing, in theory, such an ILEC could initiate a new challenge asserting that the market had further developed during the course of the prior litigation—a classic vicious circle.

to "reduce the likelihood of litigation regarding the requirements of section 251(c)(3) and the costs associated with such litigation" and "provide financial markets with greater certainty in assessing new entrants' business plans, thus enhancing the ability of new entrants, including small entities, to raise capital."[16]

Second, the *Local Competition Order*, in identifying loops, switching, transport, signaling, and operator services as network elements properly combined the factors set forth in section 251(d)(2) with the specific items comprising the section 271 "competitive checklist."[17] It is difficult to conceive of a rationale under which Congress could have determined that a particular element was sufficiently critical to opening local markets that it must be included as part of the checklist, but not important enough to satisfy the standards of section 251(d)(2). Nothing in the Court's opinion disputed the obvious relevance of this consideration to the Commission's determination.

Third, the Court did not question the underlying rationale for the statutory unbundling requirement: the need to require ILECs to share their enormous "economies of density, connectivity and scale" in order to make meaningful competition possible.[18] Congress recognized that these ILEC advantages had created "the most significant economic impediments to efficient entry into the monopolized local market" and were viewed as "creating a natural

---

16 *Local Competition Order*, ¶ 242.

17 47 U.S.C. § 271. *See, e.g., Local Competition Order*, ¶ 377 (loops); ¶ 410 (switching); ¶ 439 (transport); ¶ 479 (signaling and databases); ¶ 534 (operator services and directory assistance).

18 *Local Competition Order*, ¶ 11.

monopoly."[19] Accordingly, the Commission must advance those goals by ensuring that new entrants are able to enjoy economies comparable to those of the ILECs in order to grant them the opportunity to compete effectively.

Similarly, nothing in the Court's opinion, or in the statute, allows for the resurrection of the broad contrary arguments the ILECs have repeatedly raised against the concept of unbundled access. The Eighth Circuit properly rejected the ILECs' "vague[]" claims that unbundling should be restricted because it discouraged facilities-based competition and held that the statutory goal was "to expedite the introduction of pervasive competition into the local telecommunications industry."[20] Rather than disapproving that holding, the Supreme Court recognized that the 1996 Act accorded competitors with broad rights to employ the ILECs' capabilities.[21] Accordingly, any claims that the Commission should restrict access to elements that otherwise satisfy the "necessary" and "impair" standard on the unsubstantiated grounds that unbundling is generally counterproductive or regulation is too costly should be disregarded for what they are: improper collateral attacks on the policy choices made by Congress.

Fourth, the Court rejected several ILEC claims that particular network elements identified by the Commission fall outside the definition of section 3(29).[22] Specifically, the ILECs

---

19 *Id.*

20 *Iowa Utilities Board v. FCC*, 120 F.3d 753, 815-816 (8th Cir. 1997).

21 119 S. Ct. at 736.

22 47 U.S.C. § 153(29).

challenged the Commission's designation of OSS, operator services and directory assistance, and vertical features as UNEs claiming that the designation was beyond the Commission's statutory authority. The Court summarily rejected each of those challenges.[23] Consequently, there can no longer be any question that the Commission, mindful of the factors laid out in section 251(d)(2), has the authority to require that all of the elements it identified in Rule 319 (as well as any other elements found to meet the criteria) must be made available under section 251(c)(3).

Fifth and finally, the Court did not question the Commission's definition and application of the term *proprietary* in section 251(d)(2). The Commission treated as *proprietary* only those elements with "proprietary protocols or . . . containing proprietary information."[24] It found very few proprietary problems concerning the seven network elements it identified.[25] No party has ever challenged any of these conclusions.

B. Components of the Commission's Prior Decision that Require Reconsideration

The Supreme Court found fault with two specific aspects of the Commission's reasoning. First, the Commission had held that, in applying the "necessary" and "impair" standards, it would look only at whether a particular network element's functionality could be duplicated by

---

23 119 S. Ct. at 734.

24 *Local Competition Order*, ¶ 282.

25 The Commission found no proprietary problems with the loop (*Local Competition Order*, ¶ 388), the network interface device (¶ 393), tandem switching (¶ 425), transport (¶ 446), signaling protocols for SS7 networks (¶ 481), call-related databases (¶ 490), and operator services and directory assistance (¶ 539). It did find some proprietary problems in the service creation environment and the service management system (¶ 497), which it resolved.

another element within the ILEC's network.[26] The Court held that the Commission must also look outside the ILEC's network for possible substitutes.[27]

Second, the Commission found that the "impair" standard would be satisfied if CLECs could show that their costs would increase, or their quality of service would decrease, in any amount if they were forced to obtain a functionality outside the ILEC's network[28] (and that access was "necessary" if the CLECs would be "significantly impaired" in that way).[29] The Court concluded that this was erroneous because the Commission's construction of the statutory standard "assum[ed] that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services."[30] The Court noted that there could be situations in which CLECs that were forced to obtain substitutes for an ILEC UNE would confront increased costs that might not necessarily reduce their ability to provide service, only slightly diminished profits.[31]

---

26 *Id.*, ¶ 283.

27 119 S. Ct. at 735 ("[t]he Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network").

28 *Local Competition Order*, ¶ 285.

29 *Id.*, ¶ 282.

30 119 S. Ct. at 735 (emphasis in original).

31 *Id.*

Considered together, these two missteps guided the Court to its conclusion that the Commission had taken an extreme position: a proposed element would be deemed to fail the "impair" standard only if its functionality were duplicated by some different facility within the ILEC's network and at the same or lower cost. Therefore, the Court's narrow holding was that the Commission had failed to provide "some limiting standard, rationally related to the goals of the Act."[32] Accordingly, the Commission by this rulemaking must identify and apply a rational limiting standard in determining which network elements must be made available on an unbundled basis to CLECs.

II. THE COMMISSION SHOULD ADOPT A UNIFORM NATIONAL LIST OF NETWORK ELEMENTS SUBJECT TO THE UNBUNDLING RULES.

In keeping with its prior decision,[33] the Commission should adopt a uniform national list of network elements subject to its unbundling requirements. While the ILECs have argued repeatedly that decisions as to which particular network elements will be subject to the unbundling requirements should be made on a more individualized, or case-by-case, region-by-region, carrier-by-carrier, basis,[34] such a decision would be a recipe for delay and litigation and would likely have a remarkably deleterious effect on the development of competition in the local telecommunications market. Moreover, an individualized decision-making matrix would lead to increased costs to potential competitors, because, among other things, the lack of certainty

---

32 *Id.* at 734 (emphasis in original).

33 *Local Competition Order*, ¶ 242.

34 Oral Argument, *AT&T Corp. v. Iowa Util. Bd.*, tr. at 67.

generated by such a regime would make it radically more difficult for CLECs even to develop business plans much less roll-out strategies and service provision. Such impediments to the development of local competition are utterly inconsistent with the underlying goals of the 1996 Act.

In addition, as the Commission correctly decided in the *Local Competition Order*, Prism urges that whatever list of network elements ultimately found subject to unbundling requirement be considered a minimum set of elements.[35] Because of their familiarity with local economic conditions, Prism considers state commissions uniquely situated to evaluate the needs of new entrants desiring to compete in their respective states. Therefore, while the state commissions should not be allowed to remove network elements from the minimum set adopted by the Commission,[36] they should be "free to prescribe additional elements" as dictated by local or regional economic conditions to ensure the evolution of local competition.[37]

---

35 *Local Competition Order*, ¶ 366.

36 Permitting state commissions to remove elements from the minimum set promulgated by the Commission would lead to the same potential crises of uncertainty discussed in the earlier in these comments.

37 *Local Competition Order*, ¶ 366.

III. THE COMMISSION SHOULD DEFINE THE TERM "PROPRIETARY" IN A COMPARATIVELY NARROW MANNER FOR PURPOSES OF SECTION 251(D)(2)(A) TO ENSURE THE AVAILABILITY OF NETWORK ELEMENTS ESSENTIAL TO THE DEVELOPMENT OF LOCAL COMPETITION.

In section 251(d)(2)(A),[38] the Commission is called upon to define which network elements should be made available to requesting telecommunications carriers on an unbundled basis as required by section 251(c)(3).[39] In making this determination, the Commission is compelled to "consider, at a minimum,"[40] whether access to so-called "proprietary" elements is necessary for the requesting carrier to provide its services.[41] In this rulemaking, Prism urges the Commission not to adopt an unduly broad definition of the term "proprietary." Insofar as the construction of the statute suggests that those network elements that are "proprietary in nature" must be shown by a requesting carrier to be "necessary" to the provision of its proposed service,[42] an unduly broad definition could have the unintended consequence of raising another barrier to entry and, as such, one more barrier to local competition.

---

38 47 U.S.C. § 251(d)(2)(A).

39 47 U.S.C. § 251(c)(3).

40 47 U.S.C. § 251(d)(2) (emphasis added).

41 47 U.S.C. § 251(d)(2)(A).

42 *Id.*

In the *Local Competition Order*, the Commission found that "proprietary elements" are those "elements with proprietary protocols or elements containing proprietary information."[43] This definition, while not particularly harmful to competition, is also not adequate to foster competition by ensuring unbundled access to vital network elements. Accordingly, Prism urges the Commission to adopt a more specific definition of the term "proprietary," which specifically excludes from its scope any functionality that (1) is offered in an identical or exceedingly similar manner by multiple carriers, (2) is defined informally by broad industry practice, or (3) is defined more formally by an industry standard-setting body, such as Bellcore or IEEE. Such functionalities by their very nature cannot reasonably be considered proprietary to a particular carrier to the extent they are common practice among various incumbent carriers.

By creating these exclusions, Prism believes the Commission will enable more ready access by competing carriers to network elements that are vital to the development of local competition in a vast array of telecommunications services.

IV. THE COMMISSION SHOULD FIND THAT UNBUNDLED ACCESS TO A PARTICULAR NETWORK ELEMENT IS "NECESSARY" WHERE A MATERIAL LOSS IN THE FUNCTIONALITY OF THE NETWORK ELEMENT WOULD RESULT WITHOUT ACCESS TO ITS "PROPRIETARY" ASPECT AND THE REQUESTING CARRIER'S SERVICE WOULD BE MATERIALLY IMPAIRED WITHOUT ACCESS.

One of the primary lessons to be gleaned from the Supreme Court's decision is that the Commission may not conclude that the mere presence of some cost or quality difference between the use of a network element and the use of a substitute functionality from an alternative source

---

[43] *Local Competition Order*, ¶ 282.

satisfies either the "necessary" or "impair" standards contained in section 251(d)(2)(A). Instead, Prism urges the Commission to inquire whether such a difference between the network element and the substitute effectively reduces a CLEC's ability to provide the services they want to offer.[44] If CLECs can fully internalize the added burden imposed by such a difference so that their ability to provide the service remains unaffected, then the section 251(d)(2) standards are not met.[45] By contrast, if a CLEC's ability to provide the proposed service would be materially adversely affected if they were required to use a proposed substitute, the Court confirms that the standard laid out in section 251(d)(2) would be met.

Accordingly, Prism urges the Commission to deem a proprietary network element "necessary" for purposes of section 251(d)(2)(A) if requesting carriers do not have available, from the incumbent or others, a reasonable substitute for such proprietary element that would enable an efficient competitor to provide a telecommunications service in an economically and functionally viable manner, accounting for the economic and functional characteristics of the proprietary element. If there is no alternative source of supply for the functionality such an element provides, and the element is used in the provision of a telecommunications service, then that element is obviously necessary for CLECs to compete, whether or not it is proprietary.

---

[44] 119 S. Ct. at 735 ("[a]n entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but has not *ipso facto* been 'impair[ed] . . . in its ability to provide the services it seeks to offer'").

[45] Thus, the Court addressed the example of a ladder that might be needed to change a light bulb. If, with a slightly shorter ladder, the person changing the bulb can still do the same job—but will merely have to stretch his or her arm further—the ability to change the bulb is not impaired. Accordingly, the longer ladder cannot be said to be necessary.

Prism suggests, however, that the theoretical availability of a substitute does not show that the functionality of a requested element is un-"necessary"; nor does it show that the inability to obtain the element would not impair a CLEC's ability to provide telecommunications services. This principle is critical to the development of effective and meaningful local competition. As the Commission correctly found, any element could be provided by a new entrant "in theory," but Congress established unbundling requirements in the Act because it recognized that such duplication would in many instances "delay" or foreclose attempts to compete against the ILECs' ubiquitous local networks and the sunk costs they represent.[46]

In addition, Prism urges the Commission to evaluate the "availability" and reasonableness of substitutes for proprietary network elements in terms of whether the employment of the substitute functionality would materially impair or reduce the CLEC's ability to offer its service, including, in particular, effects on quality, scope, timeliness, and cost. Even if a "substitute" for a proprietary element exists, if the employment of such a substitute materially impairs the CLECs ability to provide service, such an element should be deemed "necessary" for purposes of section 251(d)(2)(A).

---

[46] *Local Competition Order*, ¶ 287.

V. THE COMMISSION SHOULD CONCLUDE THAT A CARRIER IS "IMPAIRED" FOR PURPOSES OF SECTION 251(D)(2) IF A LACK OF UNBUNDLED ACCESS TO A PARTICULAR NETWORK ELEMENT MATERIALLY ADVERSELY AFFECTS THE CARRIER'S ABILITY TO PROVIDE THE PROPOSED SERVICE.

While recognizing the similarity between the "necessary" and "impair" standards,[47] and consistent with the Commission's earlier decision,[48] Prism urges the Commission to deem a carrier "impaired" for purposes of section 251(d)(2)(B) if a lack of unbundled access to a particular network element results in a material increase in cost, a material delay, or would materially restrict the range or number of customers to whom the requesting carrier could provide the proposed telecommunications service. Prism asserts that this standard will allow carriers access to the network elements that they need to compete in the marketplace, while responding to the Court's concerns of effectively requiring the unbundling of all network elements.

---

47 Both depend on the effect that depriving a competing carrier of unbundled access to a particular network element would have on that carrier's ability to provide a telecommunications service. While the "necessary" standard relates specifically to those network elements that are "proprietary in nature", see 47 U.S.C. § 251(d)(2)(A), both the "necessary" and "impair" standards are not so easily severable each from the other. For example, under the standard suggested above, unbundled access to a proprietary network element would be "necessary" if a requesting carrier could not offer the proposed telecommunications service without access to that functionality. In the same example, without access to the proprietary element, the requesting carrier's ability to provide its service would be severely "impaired" without access to that element; it would be unable to provide the service. Few situations could be worse for a competing carrier. *See Local Competition Order*, ¶ 285 (stating that the "term 'impair' means 'to make or cause to become worse . . ..'").

48 *Id.* The Supreme Court did not question the definition of 'impair' the Commission adopted. Rather, the Court called upon the Commission to limit the far-reaching implications of such a broad and apparently unbounded definition. 119 S. Ct. at 735.

VI. THE COMMISSION SHOULD EMPLOY A VARIETY OF FACTORS TO GUIDE THE DETERMINATION AS TO WHETHER A PARTICULAR NETWORK ELEMENT SATISIFIES EITHER THE "NECESSARY" OR "IMPAIR" STANDARDS.

With respect to the application of both the "necessary" and "impair" standards, Prism calls upon the Commission to recognize, as the Court did, that whether there is an alternative source for certain UNEs only begins the inquiry.[49] In particular, the Commission should consider whether differences between the requested network element and a substitute effectively reduces the CLEC's ability to provide the services it proposes to offer. While, in theory, virtually all network elements are fungible, some alternative sources undoubtedly will not be practical or economically efficient; in those situations, the mere existence of a substitute should not be allowed to offset the statutory obligations of the ILECs. In addition, the mere costs of purchasing the substitute functionality must not be the only consideration. Whether to substitute is not merely a question of balance sheets. Costs of capital, working capital and other efficient costs of providing service must also be taken into account. Finally, and equally important, potential adverse effects on the quality of service the competing carrier is able to provide with the substitute element must also be considered.

More specifically, there are a number of factors the Commission should consider in determining whether a network element is "necessary" or whether a carrier would be impaired by its lack of access to a particular network element.

---

[49] *Id.*

- Whether a reasonable substitute functionality is in fact available from the incumbent or from other sources.

- Whether a substitute functionality results in higher deployment costs or lower economies of scale than the requested element.

- Whether there are any practical difficulties in making arrangements to obtain a substitute functionality within the time frames and in the quantities required by the requesting carrier.

- Whether employing a substitute functionality results in a reduced ability to serve a broad customer base.

- Whether employing a substitute results in a material increase in the amount of time necessary to deliver services to the end user.

- Whether the substitute yields inferior functionality or performance compared to the requested element.

- Whether employing a substitute functionality diminishes the ability of requesting carriers to provide service in conformity with their legal and regulatory obligations.

Utilizing these factors among others, Prism is confident the Commission can more than amply satisfy the Supreme Court's call to "giv[e] some substance to the 'necessary' and 'impair' requirements" of section 251(d)(2).[50]

VII. THE COMMISSION SHOULD REAFFIRM ITS COMMITMENT TO ENSURING THE AVAILABILITY ON A UNBUNDLED BASIS OF THE SEVEN NETWORK ELEMENTS PREVIOUSLY IDENTIFIED IN THE *FIRST REPORT AND ORDER* AND SHOULD MODIFY THE DEFINITIONS OF CERTAIN OF THOSE NETWORK ELEMENTS.

In its *Local Competition Order*, the Commission identified seven network elements that would be subject to the unbundling requirements of section 251(c)(3).[51] Those network elements

---

[50] 119 S. Ct. at 736.

are local loops, network interface devices, local and tandem switching capability, interoffice transmission facilities, signaling and call-related databases, operations support systems functions, and operator services and directory assistance facilities.[52] Insofar as the goal of the 1996 Act is "to promote competition,"[53] the Commission performed a laudable act in identifying these seven network elements as essential to the development of local competition. In addition to contemplating the specific mandates of the 1996 Act, specifically section 271,[54] its choices contemplate and allow for both facilities-based and non-facilities-based competition as well as the deployment of advanced telecommunications services. Prism commends the Commission on the identification of this minimum set of network elements and urges their retention in this rulemaking.

At a minimum, the elements identified by Congress on the section 271 competitive checklist should be subject to the unbundling rules as they are of critical importance to the promotion and development of competition in local telecommunications markets. It is difficult to conceive of a rationale under which Congress could have concluded that a particular element was sufficiently essential to opening local markets that it must be included as part of the checklist, but not important enough to satisfy the standards of section 251(d)(2). Four of the

---

(footnote continued from previous page)

51 *Local Competition Order*, ¶ 366.

52 *Id.*

53 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

54 47 U.S.C. § 271.

seven network elements subject to unbundling under former Rule 319 are mentioned explicitly in the section 271 checklist: local loop,[55] local and tandem switching capability,[56] signaling and call-related databases,[57] and operator services and directory assistance facilities.[58] At least one, interoffice transmission facilities, is a natural extension of the unbundled access to local transport required under section 271.[59]

As described in the *Local Competition Order*, the remaining two each play a significant role in the ability of a carrier to deploy a competing telecommunications service. Regarding network interface devices, the Commission concluded that without access to the network interface device, a provider deploying its own loops would not be able "to connect its loops to the customers' inside wiring" which is necessary for it "to provide competing service."[60] Similarly, the Commission rightly concluded that unbundled access to the "massive operations support systems employed by incumbent LECs" was critical to ensuring the rapid and efficient

---

55 47 U.S.C. § 271(c)(2)(B)(iv).

56 47 U.S.C. § 271(c)(2)(B)(vi).

57 47 U.S.C. § 271(c)(2)(B)(x).

58 47 U.S.C. § 271(c)(2)(B)(vii).

59 47 U.S.C. § 271(c)(2)(B)(v).

60 *Local Competition Order*, ¶ 392.

development of local competition.[61] Accordingly, Prism asserts that the seven elements identified by the Commission in the *Local Competition Order* should be retained.

Even so, while Prism urges the Commission to maintain the minimum uniform national set of network elements it identified in the *Local Competition Order*, it asserts that the definitions of certain of the network elements subject to the unbundling requirements of former Rule 319 should be modified in a thoughtful effort to ensure the spread of competition and the efficient deployment of advanced services. In particular, Prism calls upon the Commission to refine and clarify its definitions of the local loop, interoffice transmission facilities, and operations support systems ("OSS").

A. Local Loop

The Commission defined the "local loop" as the transmission facility between a distributoin frame (or its equivalent) in an incumbent LEC central office and an end user customer premises.[62] The local loop is therefore a physical facility—a copper pair—which encompasses all the bandwidth that is capable of being transmitted over the local loop. A requesting carrier should be able to order all or any portion of the bandwidth associated with the local loop that it desires. Moreover, the Commission should prohibit ILECs from interfering with or in any way exercising control over any local loop or portion thereof that has been provisioned to another carrier pursuant to the Act or the Commission's rules. Once all or some

---

61 *Id.*, ¶ 516.

62 47 C.F.R. § 51.319(a).

portion of the local loop has been provisioned to a competing carrier, an ILEC should be compelled by the Commission to cede any right to control the provisioned element.

The Commission should also clarify that the ILEC is obliged to provide a loop capable of supporting a variety of services (*e.g.*, a continuous copper facility, free of load coils and bridge taps for advanced services), when requested by a new entrant. Along these lines, the Commission must ensure that metallic facilities remain available to new entrants on an ongoing basis. It is undisputed that telecommunications services are advancing rapidly, and many of the innovative services from which competition in the local market will most likely evolve are reliant on metallic facilities.[63] To account for the presence of digital loop carrier ("DLC"), which has the effect of disrupting the end-to-end copper transmission critical to the deployment of advanced technolgoies such as xDSL, the Commission should require sub-loop unbundling, with attendant collocation at the remote site.[64] Accordingly, the Commission must take steps now to preserve the existing copper telecommunications infrastructure.

B. Interoffice Transmission Facilities

---

63 Probably the leading example of this trend are digital subscriber line services ("xDSL") which are reliant on the availability of copper loops.

64 In this same vein, Prism encourages the Commission to review the need for copper interconnection at the central office. In many instances, particularly where space is exhausted at a central office, competitive carriers will house their switching and other facilities at an adjacent location. Because these competitors require end-to-end copper facilities from the customer premises to their switch, it is necessary for the carriers to run copper from their switch location to the central office. To date, the ILECs have denied carriers the ability to effect this copper collocation. Prism points up this issue in order to more fully elaborate on the need for end-to-end copper transmission facilities for the deploymenet of certain advanced services, such as xDSL and Prism's CDM technology.

The Commission's definition of interoffice transmission facilities ("IOF") in the *Local Competition Order*[65] essentially provides competing carriers access to the facilities they need. Prism, however, urges the Commission to refine its definition in one respect. The Commission should declare that a facility is a facility. In other words, if it is technically feasible and otherwise efficient to provide certain services over a particular type of IOF, requesting carriers should not be compelled by an ILEC to deploy their services over other facilities that may be more costly but that are otherwise no different from the requested facilities. In particular, the Commission should prohibit ILECs from requiring CLECs to carry data traffic over separate, more expensive facilities than those used by the same CLEC for its voice traffic. Given the march of technology, such a separation is certainly not necessary or even reasonable. It is, in fact, inefficient, and could impede the growth of competition in the local telecommunications marketplace. In sum, Prism urges the Commission to adopt the principle that IOF should be priced based on the physical facility provided regardless of the type of traffic carried over the facility.

C. Operations Support Systems ("OSS")

The definition of OSS set forth in former rule 319 is generally sufficient. However, Prism urges the Commission to refine the present definition in at least three respects. First, the Commission should require that the OSS offered by ILECs to CLECs must be operational and available on the same terms and conditions and in the same manner as the ILECs provide it to

---

[65] *Local Competition Order*, ¶¶ 439-451.

themselves. Second, the Commission should require the ILECs to provide more detailed provisioning information to requesting carriers. At a minimum, the ILECs should be compelled to offer access to a database including information on loops equipped for the deployment of advanced telecommunications services, including xDSL technologies, loops capable of supporting such advanced services, loop conditioning, cable pair counts, and deployment of DLC technology. Finally, Prism urges the Commission to set specific national provisioning standards for OSS. Only with an increase in the flow of information between incumbents and new entrants will competition flourish, particularly as it ensures that new entrants have adequate information to be confident that they are receiving nondiscriminatory access to UNEs, resale services, and interconnection.

VIII. THE COMMISSION SHOULD PROVIDE FOR A UNIFORM, OPEN AND EXPEDITED PROCESS BY WHICH A REQUESTING CARRIER CAN PROPOSE THAT NETWORK ELEMENTS NOT OTHERWISE SUBJECT TO THE UNBUNDLING RULES BE OFFERED TO IT ON AN UNBUNDLED BASIS.

The Commission recognized in the *Local Competition Order* that the set of network elements it proposed be subject to unbundling requirements was a minimum meant to be expanded upon whether by state commissions or by the commercial negotiation process.[66] In an effort to facilitate any expansion—whether on an individual or industry-wide basis—a *bona fide* request process has emerged. Under the *bona fide* request process, a competing carrier is permitted to request from the incumbent access to network elements not otherwise provided by

---

[66] *Id.*, ¶ 366 ("These network elements represent a minimum set of elements that must be unbundled by incumbent LECs. State commissions, as previously noted, are free to prescribe additional elements and parties may agree on additional network elements in the voluntary negotiation process").

the ILECs. The ILEC then is generally obligated to inform the requesting carrier of the availability of the requested element within its own time frame. While Prism considers this to be a reasonable process in concept, in practice, it can result in considerable delays and uncertainty. These problems arise in large part due to the fact that the ILECs calendarize the process themselves. Accordingly, a competing carrier is uncertain of the intervals it should anticipate from ILEC to ILEC. In addition, because of the lack of regulation and uniformity, a competing carrier may have to wait unduly long periods of time before it is informed as to the availability and price of the requested element. In a rapidly evolving market, such delays are unreasonable and impede entry and the growth of competition.[67]

While the *bona fide* request process is a reasonable approach to this problem, in practice, the lack of predictability and certainty associated with the open-ended and indefinite process complicates a competing carrier's ability to make strategic business decisions and frustrates competition. These frustrations can be considerably alleviated by the promulgation by the Commission of uniform time intervals under which an ILEC is required to respond once a *bona fide* request is tendered by a competing carrier. Prism therefore calls upon the Commission to adopt a uniform national process by which a competing carrier can request access to a network element not otherwise subject to the unbundling requirements and receive a response from the incumbent in a timely manner.

---

[67] The Commission itself has recognized this fact explicitly by its adoption of the so-called "rocket docket" to resolve interconnection disputes. 47 C.F.R. § 1.730 (1998). *See Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018 (1998), *recon. pending.*

IX. ONCE A REQUESTING CARRIER HAS OBTAINED AN UNBUNDLED NETWORK ELEMENT FROM AN INCUMBENT, THE INCUMBENT SHOULD BE PROHIBITED FROM SUBSTITUTING A DIFFERENT NETWORK ELEMENT ABSENT A COMPELLING SHOWING OF NEED.

Prism asserts that the Commission should use this rulemaking as a vehicle to clarify that rights to a provisioned UNE vest in the requesting carrier once provided to that carrier by the ILEC. It is essential that competing carriers be able to rely with certainty on the availability of the UNEs provisioned to them on an indefinite, going-forward basis. In order to assure competing carriers, the Commission should require ILECs to confer on competing carriers perpetual rights to utilize provisioned UNEs without interference. Without this certainty, competing carriers are at an economic and competitive disadvantage in developing business plans, coming to market, and making strategic decisions. Accordingly, Prism urges the Commission to adopt a rule which provides that once a requesting carrier has been provisioned an unbundled network element from an incumbent, the incumbent should be prohibited from substituting a different network element absent a compelling showing of need. After all, the requesting carrier has compensated the incumbent for the right to use a particular network element[68] and should therefore be unconditionally entitled to do so.

---

[68] Accordingly, no Fifth Amendment "takings" argument should be available to the incumbents. U.S. CONST. amend. V (1791) (providing "nor shall private property be taken for public use, without just compensation").

By way of example, Prism asks the Commission to consider the local loop, normally a copper pair subject to the unbundling requirements adopted in the *Local Competition Order*.[69] Many advanced telecommunications technologies that will serve as the springboard for the growth of competition in the local telecommunications marketplace are dependent on metallic loops, the existing copper telecommunications infrastructure. Nortel's CDM technology, which Prism utilizes, and xDSL technology are but two of the many innovations made to improve the services available to end users by taking advantage of an enormous existing telecommunications asset. Competing carriers deploying either of these two technologies rely upon the availability of copper loops. Such carriers cannot offer their services over fiber loops. Accordingly, in order to ensure their ability to compete with the incumbents, the ILECs must be precluded from substituting fiber loops for metallic loops, once the metallic loops have been provisioned to a competing carrier.

Prism recognizes—and it goes without saying—that technology evolves rapidly, particularly telecommunications technology. Prism also recognizes that there may come a time when it may be inefficient to deploy telecommunications services over the set of network elements identified by the Commission in the *Local Competition Order*.[70] Accordingly, Prism proposes that the Commission define a process that would permit ILECs to substitute network elements for those already provisioned to CLECs but only with a showing of compelling need. The standard Prism urges the Commission to adopt would place a significant burden on the ILEC

---

[69] *Local Competition Order*, ¶ 366.

to provide a detailed explanation regarding its "need" to substitute for the provisioned UNE. The standard should also account for the rights to the UNE vested in the CLEC upon provisioning. In addition, Prism proposes that there be a rebuttable presumption against allowing the substitution absent arms' length agreement between the parties. In particular, any standard adopted by the Commission should take particular care to ensure that any adverse effects on the CLEC arising out of the substitution are not material. If the CLEC can show that its ability to provide its service would be impaired in any material respect, the substitution should be prohibited.

In sum, certainty among competing carriers will foster competition. Accordingly, the Commission should adopt measures that reduce the ability of incumbents to play havoc with a level of certainty and security that encourages entry into the marketplace and that allows for robust competition to flourish. The pro-competitive mandate of the 1996 Act compels no less.

(footnote continued from previous page)

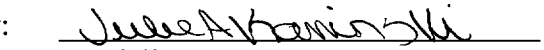
[70] *Id.*

X. CONCLUSION

The promotion of competition in the telecommunications marketplace, as is the Commission's charge, is contingent on the ability of competitive and innovative providers of telecommunications services to enter the market unburdened by unnecessary regulation and assured of ready access to those elements of the existing telecommunications infrastructure integral to the provision of advanced services. Accordingly, the Commission must in this rulemaking undertake only those actions that encourage robust competition and technological advancement. The Commission must tame the advantages of the monopolies that have defined the telecommunications industry throughout the majority of this century and nurture the next generation of competing providers to ensure that all Americans realize to the fullest extent possible the wonders of the telecommunications revolution already underway.

Respectively submitted,

PRISM COMMUNICATION SERVICES, INC.

By: 

Randall B. Lowe
Julie A. Kaminski
Renée Roland Crittendon
J. Todd Metcalf
PIPER & MARBURY, L.L.P.
1200 Nineteenth Street, NW
Washington, DC 20036
(202) 861-3900

Its Attorneys

Dated: May 26, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Comments of Prism Communication Services, Inc. was sent via hand-delivery to the individuals on the attached service list, this 26th day of May, 1999.

J. Anthony Colleli

WASH1:192346:2:5/26/99
27549-20

*Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

*Honorable Susan Ness
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

*Honorable Gloria Tristiani
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-C302
Washington, DC 20554

*Honorable Michael K. Powell
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204A
Washington, DC 20554

*Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, DC 20554

*Ms. Magalie Roman Salas
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

*Ms. Tamara Preiss
Attorney
Competitive Pricing Division
Federal Communications Commission
445 12th Street, S.W.
Room 5A-232
Washington, DC 20554

*Ms. Linda Kinney
Attorney Advisor
Policy and Programming Planning Division
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

*Mr. Lawrence E. Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-C457
Washington, DC 20554

*Mr. Richard K. Welch
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-C862
Washington, DC 20554

*Ms. Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-C327
Washington, DC 20554

*Mr. Jim Casserly
Senior Advisor
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

*Mr. Jonathan Askin
Attorney Advisor
Policy and Programming Division
Federal Communications Commission
445 12th Street, S.W.
Room 5-C207
Washington, DC 20554

*Mr. Paul Misener
Chief of Staff
Senior Legal Advisor
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, DC 20554

*Mr. Edward Krachmer
Attorney
Competitive Pricing Division
Federal Communications Commission
445 12th Street, S.W.
Room 5-A316
Washington, DC 20554

*Mr. Paul Gallant
Legal Advisor
Federal Communications Commission
445 12th Street, S.W.
Room 8-C302
Washington, DC 20554

*Mr. Peyton Wynns
Chief
Industry Analysis Division
Common Carrier Bureau
445 12th Street, S.W.
Room 5-C327
Washington, DC 20554

*Mr. Rich Lerner
Deputy Division Chief
Competitive Pricing Division
Federal Communications Commission
445 12th Street, S.W.
Room 5A-221
Washington, DC 20554

*Mr. Thomas Power
Legal Advisor
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

*Mr. Kevin Martin
Legal Advisor
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, DC 20554

*Mr. James D. Schlichting
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C254
Washington, DC 20554

*Mr. Kyle D. Dixon
Legal Advisor
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204A
Washington, DC 20554

*Ms. Carol E. Mattey
Chief
Policy and Program Planning Division
Federal Communications Commission
445 12th Street, S.W.
Room 5-C207
Washington, DC 20554